BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
ATTORNEYS AT LAW
RALEIGH, NORTH CAROLINA

MAILING ADDRESS
POST OFFICE BOX 1800
RALEIGH, N.C. 27602

OFFICE ADDRESS
1600 WACHOVIA CAPITOL CENTER
150 FAYETTEVILLE STREET MALL
RALEIGH, N.C. 27601

TELEPHONE (919) 839-0300
FACSIMILE (919) 839-0304

WWW.BROOKSPIERCE.COM

GREENSBORO OFFICE
2000 RENAISSANCE PLAZA
230 NORTH ELM STREET
GREENSBORO, N.C. 27401

WASHINGTON OFFICE
601 PENNSYLVANIA AVENUE, N.W.
SUITE 900, SOUTH BUILDING
WASHINGTON, D.C. 20004

WRITER'S DIRECT DIAL

WRITER'S EMAIL ADDRESS
KUSHNER@BROOKSPIERCE.COM

March 1, 2005

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Federal Communications Commission
Office of Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20544

Re: In the Matter of Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace
MB Docket No. 05-28

Dear Ms. Dortch:

Enclosed please find, on behalf of the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association, the original and four copies of Comments for filing in the above-referenced matter.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with the undersigned.

Sincerely,

David Kushner

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
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Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	))))	MB Docket No. 05-28

COMMENTS OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

Jonathan D. Blake
Kurt A. Wimmer
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W. (20004)
Post Office Box 7566
Washington, D.C. 20044-7566
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Counsel for the CBS Television Network Affiliates Association and for the NBC Television Affiliates Association

Wade H. Hargrove
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street Mall (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel for the ABC Television Affiliates Association and for the FBC Television Affiliates Association

March 1, 2005

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Summary

The purpose of the retransmission consent regulatory regime is to protect the ability of broadcast stations to control the retransmission and distribution of their signals by allowing the marketplace, with minimal government intrusion, to establish the terms and conditions for retransmission of broadcast signals by third parties. The history of the Commission's retransmission consent rules confirms the obvious: The Commission's rules work. Neither the Commission nor a court has ever determined that a broadcast station has abused the retransmission consent process or that the rules are, in any sense, anti-competitive. Now that the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA") has extended the "good faith" negotiation requirement to third parties seeking to retransmit broadcast signals, the competitive playing field has been leveled even further. Thus, the Network Affiliates see no warrant for the Commission to recommend any additional government intrusion into this realm of private contractual negotiations.

The purpose of the Commission's program exclusivity rules is to protect the freedom of broadcasters, networks, and program syndicators to bargain and contract for program exclusivity so that their capital may be deployed to create and distribute the best and most diverse combination of national and local television programming possible for local communities and viewers throughout the nation. The rules simply provide a forum (viz. the Commission) for enforcement of limited program exclusivity arrangements entered into by television stations. The history of this scheme confirms that the Commission's rules work. Program exclusivity is essential to "localism" and the financial viability of local television stations to provide the all-important mix of national and local broadcast programming. As with the retransmission consent rules, the Network Affiliates see no reason for further government intrusion into these private contractual negotiations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Required by the Satellite Home	)	MB Docket No. 05-28
Viewer Extension and Reauthorization Act on	)	
Rules Affecting Competition in the	)	
Television Marketplace	)	

COMMENTS OF THE ABC, CBS, FBC, AND NBC TELEVISION AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the FBC Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, hereby submit these comments in response to the *Public Notice* ("*Notice*"), DA 05-169, released by the Media Bureau on January 25, 2005, in the above-referenced proceeding.[1] The Media Bureau seeks comment, pursuant to section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"),[2] on how the Commission's rules governing retransmission consent and program exclusivity affect competition in the multichannel video program distribution market.

I. Retransmission Consent

The Commission's current retransmission consent rules,[3] for all MVPDs and broadcast

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[1] The Network Affiliates collectively represent approximately 800 local television stations affiliated with the ABC, CBS, Fox, and NBC Television Networks.

[2] Pub. L. No. 108-447, Div. J, Tit. IX (2004).

[3] *See* 47 U.S.C. § 325(b); 47 C.F.R. §§ 76.64-76.70.

stations, are grounded in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[4] The notion of retransmission consent, however, predates the 1992 Cable Act. From the early days of the Radio Act of 1927, Congress allowed broadcasters to control the use and retransmission of their signals by certain third parties. Having invested in the cost of construction and operation of a broadcast station and in the cost of production and acquisition of programming, the indiscriminate, unauthorized retransmission of a station's signal by other stations was thought to be unfair, unreasonable, and contrary to the scheme of broadcast facility allocation to *local* communities which had been carefully devised by Congress and implemented by the Commission.

In 1959, however, the Commission determined that it did not have the jurisdiction to apply the retransmission consent requirement of section 325(a) of the Communications Act of 1934 to cable systems.[5] At that time, the average cable system provided three channels and served between 500 and 1000 subscribers[6]—they were, in fact, "community antenna systems," as they were then called. These early cable systems were created to retransmit broadcast signals via "cable" to improve reception of local stations within their authorized service areas. Despite their small size and limited service, the Commission, nevertheless, recognized the economic impact that these nascent cable systems could have on local television stations and the Commission's carefully crafted plan of allocation of television channels to local communities. The Commission determined that it would recommend to Congress that cable systems be required to obtain the consent of the originating

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[4] Pub. L. No. 102-385 (1992).

[5] *See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 FCC 403 (1959), at ¶¶ 65-68.

[6] *See id.* at ¶ 10.

station as a condition precedent to retransmission of the station's signal in order to respect the station's property rights in its signal, correct the obvious competitive unfairness, and preserve the integrity of the Commission's channel allocation scheme.[7]

Since then, cable television evolved from a mechanism for simply relaying broadcast station signals into a multichannel video program distribution service capable of providing dozens, and later hundreds, of programming channels. By the time of the 1992 Cable Act, Congress recognized that the cable system exception to retransmission consent

> has created a distortion in the video marketplace which threatens the future of over-the-air broadcasting. Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.[8]

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[7] *See, e.g., id.* at ¶ 92. Congress failed to act on the Commission's recommendation at that time, and, in 1968, as cable television continued to develop, the Commission proposed—despite its 1959 holding—a modified retransmission consent regime that would apply to cable only in certain circumstances. But the Commission intentionally refrained from acting on its proposal to give Congress additional time to act or otherwise provide guidance, *see Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna TV Systems*, Notice of Proposed Rulemaking and Notice of Inquiry, 15 FCC 2d 417 (1968), and it was subsequently abandoned as a workable proposal, *see id.*, Second Further Notice of Proposed Rule Making, 24 FCC 2d 580 (1970); *Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115 (1971).

[8] S. REP. 102-92, at 35 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168; *see also* H.R. CONF. REP. 102-862, at 58 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1240 ("Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the two industries.").

Congress was especially concerned that broadcasters had been competitively encumbered and that the absence of a retransmission consent requirement "will continue to harm the system of free, universally available, local broadcasting which was central to the scheme created by the 1934 Act."[9] In eliminating the retransmission consent exception for MVPDs, Congress sought to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" but cautioned that it was not its intent to "dictate the outcome of the ensuing marketplace negotations" for retransmission of broadcast stations.[10]

When Congress established the modern retransmission consent regime and attempted to re-balance the then un-level competitive playing field, it expressly relied upon the additional protections afforded to local broadcast stations by the Commission's program exclusivity rules as crucial mechanisms that would permit television stations to exercise their rights to the fullest extent possible. In fact, Congress observed that amendments or deletions of the program exclusivity rules in a manner that would usurp localism would be "inconsistent with the regulatory structure" crafted by the 1992 Cable Act.[11] And Congress itself further expressly contemplated that broadcast stations, in exchange for retransmission consent, would seek compensation, would enter into joint marketing

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[9] S. REP. 102-92, at 55-56, 1992 U.S.C.C.A.N. at 1188-89; *see also* H.R. CONF. REP. 102-862, at 57, 1992 U.S.C.C.A.N. at 1239. The Commission also recognized that one of the principal goals of the 1992 Cable Act was "to place broadcasters on a more even competitive level and thus help preserve local broadcast service to the public." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), ¶ 104.

[10] S. REP. 102-92, at 36, 1992 U.S.C.C.A.N. at 1169.

[11] *Id.* at 38, 1992 U.S.C.C.A.N. at 1171; *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723 (1994), ¶ 114 (noting that the policies of both retransmission consent and program exclusivity "promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view").

efforts with cable operators, or would seek to program an additional channel on a cable system.[12] In particular, Congress observed: "Cable operators *pay* for the cable programming services they offer to their customers; the Committee believes that *programming services which originate on a broadcast channel should not be treated differently*."[13]

Since the inauguration of the current retransmission consent scheme some dozen years ago, there has been little occasion or need to alter it. In SHVERA's predecessor, the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"),[14] Congress sought to foster competition between cable operators and satellite carriers, while at the same time preserving broadcast localism, by, *inter alia*, providing a compulsory copyright license for the retransmission by satellite of local television signals.[15] To ensure that this new competitive scheme would be given the opportunity to work effectively, Congress required that broadcasters negotiate retransmission consent rights in "good faith" and prohibited them from entering into an exclusive retransmission consent agreement with an MVPD. By this "good faith" requirement, Congress envisioned that a

> television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The FCC may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive

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[12] *See* S. REP. 102-92, at 35-36, 1992 U.S.C.C.A.N. at 1168-69.

[13] *Id.* at 35, 1992 U.S.C.C.A.N. at 1168 (emphasis added).

[14] Pub. L. No. 106-113 (1999).

[15] *See, e.g.*, H.R. CONF. REP. 106-464, at 92 (1999) (stating that "the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism" and, "perhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders [requiring it] to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate"); *see also* H.R. REP. 106-79(I), at 15 (1999).

marketplace considerations.[16]

SHVERA now makes this good faith negotiating requirement reciprocal and applies it to all MVPDs as well as to broadcasters.[17] The Commission itself has recognized that SHVIA did not "contemplate an intrusive role for the Commission with regard to retransmission consent" or "grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions" or "intend the Commission to sit in judgement of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[18] In fact, as the Commission observed, "[R]etransmission consent negotiations are *the market* through which the relative benefits and costs to the broadcaster and MVPD are established."[19] And, most recently in SHVERA, Congress once again recognized that the satellite industry's compulsory copyright license effectively gives these broadcast industry competitors a "Government subsidy."[20] This compulsory copyright license, as Congress observed, provides "valuable accommodations that benefit the DBS industry."[21]

The Network Affiliates believe the current retransmission consent process furthers the interest of competition in the programming marketplace, and there is no evidence to the contrary.

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[16] H.R. CONF. REP. 106-464, at 105; *see also Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445 (2000) ("*Good Faith Order*"), at ¶ 56 (listing bargaining proposals that presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement).

[17] *See* SHVERA, § 207 (amending 47 U.S.C. § 325(b)(c)(3)).

[18] *Good Faith Order*, at ¶¶ 13, 23.

[19] *Id.* at ¶ 53 (emphasis added).

[20] H.R. REP. 108-660, at 53 (2004) (statement of Rep. Berman).

[21] *Id.* at 9 (Judiciary Committee report).

During the past dozen years, consisting of four retransmission consent election cycles for cable and one election cycle for satellite as well as the thousands of individual negotiations that have occurred between broadcasters and MVPDs, the Commission has been confronted with *fewer than 10* complaints arising from the retransmission consent process, and it has been necessary for the Commission to adjudicate a retransmission consent dispute in only *one* instance.[22] And, in that one case, the Commission not only found that the broadcaster *had not* violated the regulatory scheme or the good faith negotiation requirement but, instead, that the MVPD complainant, EchoStar, *had* abused the Commission's processes.[23] Thus, the record of retransmission consent negotiations speaks for itself.

In addition to the lack of any evidence of a break-down in the retransmission consent process, there is no evidence of any break-down in the marketplace itself. It is well-known that, following the 1992 Cable Act, cable operators resisted direct payment of cash to stations in exchange for

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[22] In all but the one instance, the parties either reached a private settlement or the Commission dismissed or found moot the retransmission consent issue. *See EchoStar Satellite Corp. v. Clear Channel Communications*, Public Notice, Report No. 3742 (July 24, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Chris-Craft Broadcasting*, Public Notice, Report No. 3743 (July 28, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Landmark Communications*, DA 00-2102 (rel. Sept. 15, 2000) (complaint dismissed upon request of parties); *Paxson Communications Corp. v. DirecTV*, DA 02-102 (rel. Jan. 14, 2002) (issue moot); *Monroe, Georgia, Water, Light, and Gas Comm'n v. Morris Network, Inc.*, DA 04-2297 (rel. July 27, 2004) (issue dismissed by Media Bureau); *Horry Telephone Coop. v. GE Media, Inc.*, DA 05-136 (rel. Jan. 26, 2005) (complaint dismissed upon request of parties).

In addition to these resolved disputes, on January 19, 2005, CoxCom, Inc. filed a "good faith" negotiation complaint against Nexstar Broadcasting. That matter is pending at the Commission.

Finally, the well-known dispute between Time Warner Cable and ABC, Inc. involved a question of the application of the must-carry rules at the Commission, not the retransmission consent regime, in which the Commission found Time Warner Cable's removal of ABC's stations' signals during a sweeps period to be in violation of section 614(b)(9) of the Communications Act. *See Time Warner Cable*, DA 00-987 (rel. May 3, 2000) and DA 01-636 (rel. Mar. 9, 2001).

[23] *See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001).

retransmission consent rights. Instead, some broadcasters negotiated for and received (to varying degrees) consideration of other kinds, such as an agreement by a cable operator to purchase advertising on the stations; an agreement by a cable operator to promote broadcast stations on cable program service channels; an agreement by a cable operator to allow a broadcast station to sell local advertising time in cable program services; and/or an agreement by a cable operator to carry a local news channel or to carry other programming channels owned by the broadcast company, the latter of which has led to the creation and launch of additional and more diverse cable programming services. Assertions have been made from time to time, principally by small cable operators, that these retransmission consent agreements have somehow led to the increases in the subscription rates charged to cable and satellite customers. Recently, however, the General Accounting Office determined that broadcaster ownership of national cable networks, whose cable carriage is ensured through the retransmission consent negotiation process, does not result in cable systems paying higher fees for such broadcaster-owned networks than for other cable networks:

> In particular, we found that cable networks that have an ownership affiliation with a broadcaster did not have, on average, higher license fees (i.e., the fee the cable operator pays to the cable network) than cable networks that were not majority-owned by broadcasters or cable operators.[24]

In addition, the GAO had evidence that "at least *half* of the license fees cable operators pay to carry their networks are recouped through the sale of the local advertising time that cable networks allow the cable operators to sell."[25]

In sum, the purpose of the current retransmission consent regulatory regime is to protect the

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[24] U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 (Oct. 2003), at 28-29.

[25] *Id.* at 24 (emphasis in original).

ability of broadcasters to control the retransmission and distribution of their signals by allowing the marketplace, with minimal government intrusion, to establish the competitive terms of retransmission of broadcast signals by non-broadcast means. The history of the retransmission consent rules shows that they have worked over the past dozen years, and neither the Commission nor a court has ever determined that a broadcast station has abused the retransmission consent process or that the rules are, in any sense, anti-competitive. That record is all the more remarkable given the thousands of negotiations that have taken place between television stations and MVPDs since 1992. Now that SHVERA has made the good faith negotiation requirement reciprocal, the playing field has been leveled even further, and the Network Affiliates see no warrant for the Commission to recommend additional government intrusion into these of private contractual negotiations.

II.
Program Exclusivity

The history of the current program exclusivity rules[26] need not be recounted in full detail to understand that their purpose and structure are, like those of the retransmission consent regime, designed to protect "localism" and the private contractual rights of broadcasters and, thus, to further the broad distribution of diverse programming to the public. The first program exclusivity rule, a predecessor to the current network nonduplication rule, was promulgated in 1965. Against the background of Congress not having acted upon an earlier recommendation by the Commission to apply retransmission consent to cable, the Commission stated that "reasonable nonduplication

[26] The program exclusivity rules include the network nonduplication rules, *see* 47 C.F.R. §§ 76.92-76.95, 76.120-76.122, and the syndicated program exclusivity rules, *see* 47 C.F.R. §§ 76.101-76.110, 76.120, 76.123-76.125. Related to the program exclusivity rules are the sports blackout rules, *see* 47 C.F.R. §§ 76.111, 76.120, 76.127-76.130.

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requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed."[27] This was followed, in 1972, by the first syndicated exclusivity ("syndex") rule, which was adopted as a result of a "Consensus Agreement" that had been negotiated by the cable, broadcast, and program production industries to facilitate passage of copyright legislation. The Commission expressed the view that this additional program exclusivity rule would "protect local broadcasters and insure the continued supply of television programming" which, the Commission noted, is "fundamental to the continued functioning of broadcast and cable television alike."[28]

Following the 1976 revision to the Copyright Act, which created the section 111 compulsory copyright license, the Commission soon took the view that the unfair competition between cable operators and broadcast stations that the syndex rules were aimed at ameliorating was actually coextensive with the issue of copyright liability, which had just been resolved in the 1976 Act, so that there remained no reason to retain the syndex rules.[29] Because the Commission determined that the potential effect of eliminating syndex protection both on local station audiences and on program supply would be minor, the Commission repealed the syndex rules in 1980.[30]

By the late 1980s, however, the Commission found that its earlier analysis leading to the repeal of the syndex rules had been misdirected. In reinstituting syndex rules in 1988, while maintaining its network nonduplication rules, the Commission determined that it had

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[27] *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, 38 FCC 683, 706 n.37 (1965).

[28] *Cable Television Report and Order*, 36 FCC 2d 143, 169 (1972).

[29] *See Cable Television Syndicated Program Exclusivity Rules*, 79 FCC 2d 663 (1980), ¶ 193.

[30] *See id.* at ¶¶ 217, 242.

previously—and incorrectly—focused on competitors rather than on competition.[31] Thus, in properly refocusing on how the competitive market process operates, the Commission sought to remove government intrusion into that process and, therefore, "to remove anticompetitive restrictions on the ability of broadcasters to serve their viewers."[32] The prior repeal of the syndex rules in 1980 was, as noted above, a direct consequence of the institution of the new section 111 compulsory license, but, because that compulsory license was an abrogation of full copyright liability, such a license already represented a movement *away* from a market situation. The repeal of syndex protection itself, then, "given the existence of the compulsory license, moved the marketplace *further away* from effective freedom of contract."[33] Without regard to specific competitors, competition itself suffered as a consequence, since, as the Commission recognized, "[f]reedom of contract and, in general, enforceable property rights, are essential elements of a competitive marketplace."[34]

Therefore, during its Program Exclusivity rulemaking proceeding, the Commission essentially decided that it needed to minimize government interference so

> (1) that its regulations foster a level playing field among the various competitors, including those who produce and those who distribute [programming]; and (2) that freedom of contract, and thus private property rights, are unimpeded by the Commission's regulation or

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[31] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988) ("*Program Exclusivity Order*"), at ¶ 23.

[32] *Id.* at ¶ 1.

[33] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987) ("*Program Exclusivity NPRM*"), at ¶ 26 (emphasis in original).

[34] *Id.*

deregulation of the industries.[35]

The Commission observed further:

> For competition to maximize consumer benefits, it is important that a property rights framework be applied that permits markets to operate effectively. Failure to supply an appropriate structure of rules and regulations will lead to market failures in satisfying consumer preferences. To ensure free and efficient functioning of competitive market processes, the Commission seeks to permit equality, to the extent possible within our regulatory framework, of contractual opportunity among competing modes of distribution. In the instant setting, that means permitting broadcasters to acquire and enforce the same kinds of exclusive performance rights that competing suppliers are now permitted to exercise. Failure to supply parity in contractual freedom will bias the nature of competitive rivalry among competing suppliers in ways not grounded in operating efficiencies but instead based on artificial handicaps exacerbated by disparate regulatory treatment.[36]

The 1980 removal of syndex protection had tilted the competitive playing field in cable's favor (a particular competitor) since cable operators had the ability to enter into exclusive contracts with program suppliers, but broadcast stations did not. The Commission saw that this lack of contractual parity had skewed the video programming market, to the detriment not only of broadcasters and their advertisers but also of television viewers. Broadcasters' "inability to enforce exclusive contracts puts them at a competitive disadvantage relative to their rivals who can enforce exclusive contracts; their advertisers' abilities to reach as wide an audience as possible are impaired; and consumers are denied the benefits of full and fair competition: higher quality and more diverse programming, delivered to them in the most efficient possible way."[37]

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[35] *Id.* at ¶ 5.

[36] *Id.* at ¶ 12.

[37] *Program Exclusivity Order*, at ¶ 62. The Commission found the illogic of the lack of syndex protection particularly telling:

(continued...)

Ultimately, the Commission concluded that syndex protection was necessary as a counter-weight to an imperfect compulsory license scheme where copyright holders are not paid the full value for the right to distribute their works, i.e., copyright holders are paid a price not set by the marketplace. The Commission determined that the potential negative effect of the disincentive to produce and distribute programming that consumers might desire could be countered by re-introducing a parity in property rights in the form of syndex protection. As the Commission stated: "[S]yndicated exclusivity rules are an important component of a sound communications policy designed to foster full and fair competition among competing television media. Without syndicated exclusivity, there is a likelihood that programs will not be distributed efficiently among alternative outlets and that viewers will not get the most efficient quantity and diversity of programming."[38]

Although network nonduplication was not subject to the same repeal and reinstitution as

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[37](...continued)

> Normally, firms suffer their most severe losses to competitors when they fail to offer the services most desired by the public. In the absence of syndicated exclusivity, extensive duplication reverses this relationship for broadcasters—they suffer their most severe loss precisely when they offer programming most desired by audiences; thus diversion is an indication of a competitive imbalance that results from the absence of the rules. Firms that choose to exhibit programming on an enforceable exclusive basis (e.g., cablecasters) generally do not face the problem of audience diversion to duplicative product. The fact that only broadcasters suffer this kind of diversion is stark evidence, *not* of inferior ability to be responsive to viewers' preferences, but rather of the fact that broadcasters operate under a different set of competitive rules. All programmers face competition from alternative sources of programming. Only broadcasters face, and are powerless to prevent, competition from the programming they themselves offer to viewers.

Id. at ¶ 42 (emphasis in original).

[38] *Id.* at ¶ 75.

syndex, the Commission has been well aware that any differences between network nonduplication and syndex appear "to be more one of degree than of kind" and that the "same policy arguments" apply to both.[39] Finally, then, following the 1988 reinstitution of syndex protection together with the maintenance of network nonduplication protection and the adoption of the modern retransmission consent regime following the 1992 Cable Act, the Commission was able to eliminate the "artificial handicaps exacerbated by disparate regulatory treatment."[40]

In adopting regulations to implement SHVIA in 1999, the Commisison, while attempting to level the competitive playing field between cable operators and satellite carriers, remained "cognizant also of the important protection that the exclusivity rules provide to broadcasters and copyright holders."[41] Accordingly, the Commission attempted to structure the program exclusivity and sports blackout rules[42] in the satellite context to be as parallel as possible to the analogous rules in the cable context.

Periodically, the Commission has had to resolve requests from cable operators and from broadcasters for waiver of, or special relief from, the program exclusivity rules. The Commission has a well-established waiver policy applicable in these circumstances, and it appears that the availability of a waiver, provided the Commission's waiver criteria are satisfied, ameliorates any

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[39] *Program Exclusivity NPRM*, at ¶ 48.

[40] *Id.* at ¶ 12.

[41] *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplicaiton, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, 15 FCC Rcd 21688 (2000), at ¶ 5.

[42] As the sports blackout rules are intended and designed to protect the rights of third party entities that are not FCC licensees, e.g., sports leagues and sports teams, they appear to have little impact on the competitive video programming marketplace as between the principal competitors in that marketplace, i.e., broadcasters, cable operators, and satellite carriers. Consequently, the Network Affiliates do not intend to focus on the sports blackout rules in these comments.

potential harm that might result from strict operation of the Commission's regulations.[43] Indeed, in some cases, the Commission has viewed a failure of the marketplace as a prerequisite to considering the merits of a waiver request.[44] And in at least one case, grant of a waiver was predicated upon the private settlement between cable operators and broadcasters of a long-running, contentious dispute over network nonduplication and syndex protections.[45] There is no evidence, however, that these occasional waiver and special relief requests are unduly burdensome on the Commission's resources or that their dispositions have had negative implications for competition.

In sum, the purpose of the current program exclusivity rules is to protect the freedom of contract of broadcasters, networks, and program syndicators so that their capital may be deployed to create and distribute the best and most diverse television programming possible and, thereby, to maximize consumer welfare. The history of this scheme confirms that it has worked since the reinstitution of syndex protection in 1988, and there is no evidence of substantial marketplace failure. As with retransmission consent, the Network Affiliates see no warrant for the Commission to recommend additional government intrusion into this realm of purely private contractual negotiations.

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[43] *See, e.g., KKTV, Inc.*, 6 FCC Rcd 3621 (1991), at ¶ 6 (stating that the "special relief process exists as a safety valve[] to ensure that the rules are allowed to operate in accordance with their intended purposes"); *Continental Cablevision of Ohio, Inc.*, 7 FCC Rcd 499 (1992), ¶ 6 (same).

[44] *See, e.g., King Videocable Co.*, 6 FCC Rcd 2218 (1991), at ¶ 5 (denying waiver where the cable operator failed to demonstrate that the matters of which it complained could not be resolved through negotiations between the involved parties).

[45] *See Desert Empire Television Corp.*, 10 FCC Rcd 7114 (1995).

III.
Potential Effects on Competition in the Television Marketplace Due to Industry-Specific Differences in the Current Regulatory Structure

With SHVIA, and now SHVERA, Congress has made the competitive playing field with respect to cable operators and satellite carriers ever more level. Particularly with SHVERA permitting, but not requiring, satellite carriers to retransmit the signals of stations into areas in which they are significantly viewed and extending to satellite carriers a compulsory copyright license to retransmit the signals of low power television stations in certain circumstances, the overall compulsory copyright license schemes are largely parallel for these two competitors. These changes are so new, however, that it is premature for the Commission to determine at this juncture whether further statutory change in the scope of the compulsory licenses is necessary.

It appears, instead, that the most substantial differences in the compulsory license schemes for cable and satellite relate not to the scope of the licenses but rather to royalty rates. But, (i) as the royalty rates are immaterial in television stations' negotiations with MVPDs for retransmission consent rights or in television stations' negotiations with their networks for network nonduplication protection or with program syndicators for syndex protection and (ii) the Commission does not have jurisdiction with respect to such royalty rates, the Network Affiliates do not comment at this time in this proceeding as to whether there should be any changes in the royalty rate structures.

Both Congress and the Commission, through this proceeding and the subsequent report to Congress, intend to investigate whether rural cable operators are somehow being disadvantaged vis-à-vis satellite carriers with respect to the delivery of *digital* broadcast television signals to consumers.[46] As an initial matter, the Network Affiliates note that small cable operators, i.e., those with fewer than 1000 subscribers, are exempt from the Commission's network nonduplication and

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[46] *See* SHVERA, § 208(a).

syndex rules,[47] that the small cable operator exceptions apply to a *majority* of rural cable operators,[48] and that the exceptions represent a government override of privately negotiated contracts between, and the property rights of, television stations and their program suppliers. Thus, the Commission already provides small cable operators government benefits not extended to their competitors. In any event, it is premature to determine whether the current regulatory scheme impairs the ability of rural cable operators to compete with satellite carriers in the retransmission of *digital* broadcast signals. Satellite carriers are retransmitting few digital broadcast signals pursuant to retransmission consent agreements (only the signals of some network owned-and-operating stations in a handful of markets). Certain rural cable operators may be retransmitting digital broadcast signals, but that would depend on the bandwidth capacity of their systems and whether they have obtained retransmission consent. Because the Commission has rejected dual analog and digital carriage requirements, the digital signals of the television stations that have elected mandatory carriage may not be carried.[49] For stations that elected retransmission consent and actually entered into an analog carriage agreement with an MVPD, carriage of digital signals will also depend on the prescience at the time of negotiation of the broadcaster and the MVPD to include consent for retransmission of digital signals. In any event, because the retransmission consent and program exclusivity rules do not treat digital signals differently than analog signals, it is difficult to discern how the regulations disadvantage rural cable operators vis-à-vis satellite carriers, especially in light of the small cable

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[47] *See* 47 C.F.R. §§ 76.95(a), 76.106(b).

[48] As of December 2004, at least 53% of all cable systems (i.e., at least 4481 of 8409 cable systems) serve less than 1000 subscribers and therefore are not subject to the network nonduplication and syndex rules. *See* TELEVISION & CABLE FACTBOOK 2005, at F-2.

[49] *See Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, FCC 05-27 (released Feb. 23, 2005).

operator exceptions to the rules.

Conclusion

For the foregoing reasons, and as history demonstrates, there is no need for the Commission to recommend to Congress any changes in the retransmission consent and program exclusivity regimes at this time.

Respectfully submitted,

NETWORK AFFILIATED STATIONS ALLIANCE

Jonathan D. Blake
Kurt A. Wimmer
Jennifer A. Johnson
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W. (20004)
Post Office Box 7566
Washington, D.C. 20044-7566
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Counsel for the CBS Television Network Affiliates Association and for the NBC Television Affiliates Association

Wade H. Hargrove
Mark J. Prak
David Kushner
BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street Mall (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel for the ABC Television Affiliates Association and for the FBC Television Affiliates Association

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